

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOHAMMED Z. ALAM	:	DETERMINATION
	:	DTA NO. 819188
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period March 1, 1998	:	
through February 28, 2001.	:	

Petitioner, Mohammed Z. Alam, 201 Ocean Parkway, Apartment 4H, Brooklyn, New York 11218, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1998 through February 28, 2001.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 8, 2004 at 1:15 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Chae K. Kuo).

ISSUE

Whether the Division of Taxation properly determined, upon audit, that petitioner owed additional sales tax, plus penalty and interest.

FINDINGS OF FACT

1. Petitioner, Mohammed Z. Alam, is engaged in the business of operating a push cart selling hot dogs, sodas and other soft drinks, and hot pretzels in mid-town Manhattan. On

December 11, 2000, an investigator for the Division of Taxation (“Division”) conducted an observation of petitioner’s business activities. From this observation and discussion with petitioner, the investigator concluded that petitioner worked five days per week, from 11:00 A.M. to 6:00 P.M. each day. During the time period of 11:00 A.M. to 2:00 P.M., the investigator observed total sales of \$22.00, with a taxable ratio of 95%.

2. The Division issued to petitioner a letter, dated January 9, 2001, scheduling an audit appointment at the Division’s Brooklyn office on January 31, 2001 at 2:00 P.M. This letter advised petitioner to bring to the audit appointment all books and records pertaining to the sales and use tax liability of his business for the period December 1, 1992 through May 31, 2000, including financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, Federal income tax returns and any exemption certificates. An accompanying one-page checklist of records reiterated the records petitioner was to bring to the audit appointment. Following postponements of scheduled appointments, two additional appointment letters were sent to petitioner on February 6, 2001 and May 9, 2001. On May 14, 2001, petitioner executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law which extended the date of assessment for the period March 1, 1998 through February 28, 1999 to June 20, 2002.

3. Petitioner, who had filed sales tax returns but reported no taxable sales, did not submit any books and records to the Division. Accordingly, on April 8, 2002, the Division issued to petitioner a Notice of Determination assessing sales tax due for the period March 1, 1998 through February 28, 2001 in the amount of \$16,658.99, plus penalties (pursuant to Tax Law § 1145[a][1][i], [vi]) and interest. The Division’s auditor calculated this liability on the basis of the Brooklyn office’s experience with other push cart vendors as well as information obtained

from the Division's Technical Unit in Albany. Specifically, the auditor multiplied estimated daily gross sales of \$375.00 by a taxable ratio of 95% to arrive at daily taxable sales of \$356.25. In turn, daily taxable sales were multiplied by 260 (52 weeks x 5 work days per week) to arrive at total yearly taxable sales of \$92,625.00. This figure was then multiplied by 3 years to arrive at taxable sales for the audit period of \$277,875.00. Added to this figure were cart storage fees of \$600.00 per quarter, or \$7,200.00 for the 12 quarters of the audit period, to arrive at the total amount subject to sales tax for the audit period of \$285,075.00. Dividing this amount by 12 and multiplying by the applicable sales tax rate the auditor arrived at tax per quarter of \$1,959.89.

In computing the amount of tax due for the audit period, the auditor concluded that petitioner had worked approximately eight months per year in the first two years of the audit period, and ten months during the final year, which covered the period March 1, 2000 through February 28, 2001. Total additional sales subject to tax were determined to be \$201,927.00, and total tax due was computed to be \$16,658.99, plus penalty and interest.

4. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As part of the conference process, petitioner established, by providing a number of purchase invoices, that during the first two years of the audit he sold only fruit from his push cart. Petitioner also established that the cart rental fee was \$175.00 per month. In view of this information, the Division reduced the amount of the assessment to \$4,300.64. This reduction was based on the following computation, using a taxable ratio of 95% and ten months of work:

Total cart rental fees (\$175.00 x 10 months)	\$1,750.00
Rent factor	3.30%
Total audited gross sales (\$1,750.00/0.033)	\$53,030.00
Total adjusted taxable sales (53,030.00 x 95%)	\$50,379.00
Cart rental fee subject to tax	\$ 1,750.00

Total amount subject to tax	\$52,129.00
Tax	\$ 4,300.64
Tax per month (4,300.64/10 months)	\$ 430.06

The total amount of tax due was applied to the sales tax quarters as follows:

<u>Period Ending</u>	<u>Tax Due</u>
5/31/00	\$1,290.19
8/31/00	1,290.19
11/30/00	1,290.19
2/28/01	<u>430.07</u>
	\$4,300.64

SUMMARY OF PETITIONER'S POSITION

5. Petitioner challenged the assessment by filing a petition for a hearing with the Division of Tax Appeals, alleging that he only worked during the warmer months, that he was out of the country for periods of time, that he did not always work five days per week due to weather conditions, and that his sales averaged approximately \$100.00 to \$120.00 per day.

CONCLUSIONS OF LAW

A. During the period in issue, petitioner conducted business as a push cart vendor in New York City making sales of hot dogs, soft drinks and pretzels. Receipts from such sales of food are clearly subject to sales tax (Tax Law § 1105[d][i]), and petitioner raises no dispute in this regard. In this case, the Division initially conducted an observation of petitioner's business activities, and determined that petitioner had made taxable sales of \$22.00 during a three-hour period. After noting that petitioner had reported no taxable sales during the audit period, the Division by letter requested an opportunity to examine petitioner's books and records, specifically with respect to his sales and sales tax liability. Petitioner did not provide any records to the Division, including records of sales. Under these circumstances the Division was clearly entitled to estimate petitioner's sales tax liability and, in turn, to issue its determination of

tax due accordingly (Tax Law § 1135[a][1]; 20 NYCRR 533.2[b][1]; ***Matter of Club Marakesh, Inc. v. Tax Commn. of the State of New York***, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276; ***Matter of Center Moriches Monument Co., Inc. v. Commissioner of Taxation and Finance***, 211 AD2d 947, 621 NYS2d 720).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained “shall include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, “the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .” (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

C. As set forth above, it was incumbent upon petitioner to demonstrate that the amount of tax assessed was incorrect or unreasonable. Petitioner did establish, via his submission of purchase invoices, that he sold only fruit during the first two years of the original audit period, and that the cart rental fee was \$175.00 per month. In turn, the Division reduced its assessment to reflect these facts, and such reduction is set forth above (*see*, Finding of Fact “4”). In addition, petitioner provided additional evidence, by way of credible testimony, that his average

daily sales were approximately \$100.00 to \$120.00. These figures are consistent with the results of the Division's own observation test. Therefore, petitioner's tax liability is to be recomputed using daily sales of \$120.00 per day, a 5-day work week and a work year of 43 weeks. In addition, petitioner is liable for the tax due on the total amount of cart rental fees of \$1,750.00.

The computation is as follows:

Total working days per year (5 x 43)	215 days
Daily taxable sales (\$120.00 x 95% taxable ratio)	\$114.00
Yearly taxable sales for audit period (\$114.00 x 215 days)	\$24,510.00
Cart storage fees	\$ 1,750.00
Total amount subject to tax	\$26,260.00
Total tax due (\$26,260.00 x 8.25%)	\$ 2,166.45

The tax is to be applied to the sales tax quarters at issue as follows:

<u>Period Ending</u>	<u>Tax Due</u>
5/31/00	\$ 649.94
8/31/00	649.94
11/30/00	649.94
2/28/01	<u>216.63</u>
	\$ 2,166.45

D. Petitioner has presented no argument or evidence which would support or warrant reduction or abatement of the penalties properly imposed in this case and the same are, therefore, sustained. Therefore, it is determined that petitioner is liable for sales and use tax due of \$2,166.45, plus penalty and interest.

E. The petition of Mohammed Z. Alam is hereby granted to the extent indicated in Conclusion of Law "C"; the Division of Taxation is directed to modify the Notice of

Determination dated April 8, 2002 in accordance with this determination; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
January 13, 2005

/s/ Thomas C. Sacca
PRESIDING OFFICER